SUPREME COURT, U. S.

JAN 14 1969

IN THE

Supreme Court of the United States

October Term, 1968

No. 850

ROBERT C. FORSETH,
Petitioner,

v.

GREAT NORTHERN RAILWAY COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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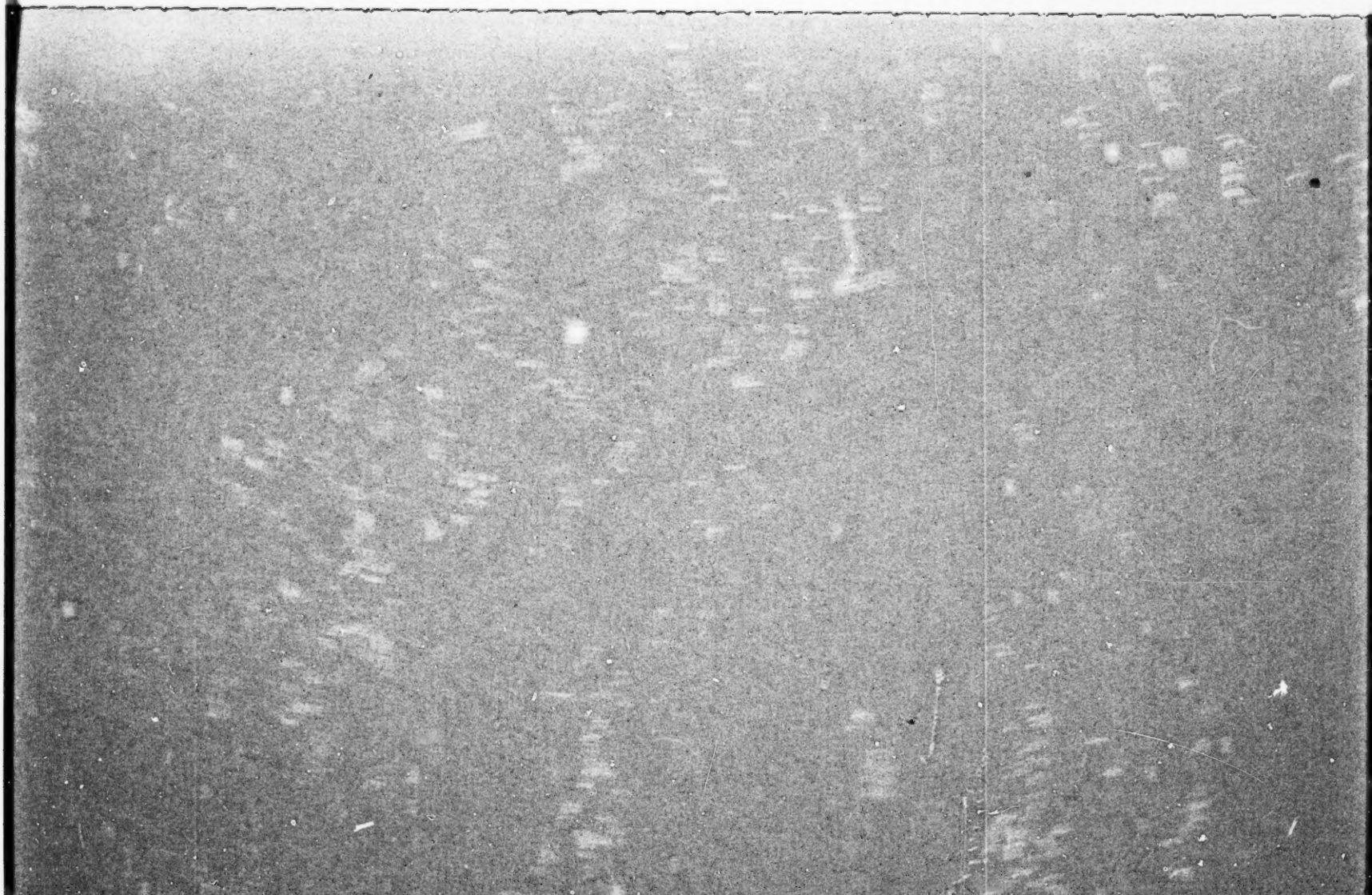

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STATEMENT OF THE CASE

On February 7, 1966, Robert G. Funseth, petitioner, was employed as a brakeman by respondent Great Northern Railway Company and claims to have injured his back operating a switch at Hillyard yard, Spokane, Washington. Petitioner Funseth testified that the switch stuck and that he was required to and did exert unusual force and power to line it. Witnesses for respondent testified that the switch operated normally at the time and place of the incident and that it had been regularly and properly maintained and serviced.

Subsequently petitioner was treated for low back pain which later necessitated surgery and fusion.

QUESTION PRESENTED

Did the trial court err in defining the necessary causal relationship between respondent's alleged negligence and petitioner's injury in the following manner?

> "A party is not entitled to recover solely because there has been an accident. Any party claiming negligence or contributory negligence has the burden of proving by a preponderance of the evidence, that the other party was negligent in some one of the particulars claimed, and that such negligence was a proximate cause of the injury and damage to plaintiff claimed.
>
> "The term 'proximate cause' means that cause which in a direct, unbroken sequence produces the injury complained of and without which such injury would not have happened.
>
> "An injury or damage is proximately cause (sic) by an act, or failure to act, whenever it appears from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about, or actually causing, the injury or damage. So, if you should find, from the evidence in the case that any negligence of the defendant contributed in any way or manner, toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission.
>
> "The primary inquiry for you to decide in this case is whether you draw the conclusion that negligence of the railroad employer played any part in bringing about the injury to plaintiff. If you find that any carelessness or negligence on the part of the railroad, or of any employee of the railroad other than the plaintiff, in any way caused or contributed even in the slightest degree to the injury or injuries complained of, then your verdict should be for the plaintiff. Similarly, if you should find, from the evidence in the case that any negligence of the plaintiff contributed in any way or manner toward any injury

or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the plaintiff's act or omission, and plaintiff's recovery will be reduced accordingly as hereinafter explained." (Clerk's Tr. 109-110)

SUMMARY OF ARGUMENT

The instructions given on causation correctly defined the necessary connection between respondent's negligence and petitioner's injury and at the same time fully informed the jury that the respondent's negligence need not be the only cause in order to produce liability and that if employer negligence played any part in producing the injury, however slight, that such injury was proximately caused by such negligence.

ARGUMENT

Contrary to petitioner's assertion, the trial court did not define causation in terms of the so-called "common law standard of proximate cause." The instructions given defining causal relationship were carefully drawn by the trial judge to reflect the two essential principles of causation under the Federal Employers' Liability Act.

First — That the employer's negligence, if any, must be a cause of the injury or damage, and

Second — That if the employer negligence caused the injury or damage in whole or in part, even the slightest, then the jury may find such negligence was a proximate cause of the injury or damage and make an award to the plaintiff.

A reading of the instructions given will indicate that the second principle received heavy emphasis while the principle requiring causal connection was covered only

once briefly. The court first instructed that to be actionable an injury must result from the negligence of some party and such negligence must proximately cause such injury. The court then defined proximate causation. In order to be doubly certain that the jury understood the limited employer involvement necessary to sustain an award, the court then instructed:

> "An injury or damage is proximately caused by an act or failure to act, whenever it appears, from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find, from the evidence in the case, that any negligence of the defendant contributed, in any way or manner, toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission."

Then, in order to be absolutely certain that the jury understood the concept that it could make an award even though employer negligence made only a minor contribution to cause the accident, the court further instructed:

> "The primary inquiry for you to decide in this case is whether you draw the conclusion that negligence of the railroad employer played any part in bringing about the injury to plaintiff. If you find that any carelessness or negligence on the part of the railroad, or of any employee of the railroad other than the plaintiff, in any way caused or contributed even in the slightest degree to the injury or injuries complained of, then your verdict should be for the plaintiff. Similarly, if you should find, from the evidence in the case that any negligence of the plaintiff contributed in any way or manner toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the plaintiff's act or omission, and plaintiff's recovery will be reduced accordingly as hereinafter explained." (Clerk's Tr. p. 109-110)

The Circuit Court Decisions Interpreting the Rule of Causation in F.E.L.A. Cases Are Harmonious

Instructions defining causation in F.E.L.A. cases have recently been reviewed by a number of circuit courts as well as by several state supreme courts. Contrary to petitioner's assertion, no conflict in the circuits has arisen and the definitions followed have been entirely harmonious.

In a few cases error has been found where the trial court gave a traditional definition of proximate cause without adequately incorporating the F.E.L.A. concept that employer negligence need only be a partial cause to support an award. *Page v. St. Louis Southwestern Railway Company,* 312 F.2d 84 (5th Cir. 1963); *Hausrath v. New York Central Railroad Company,* 401 F.2d 634 (6th Cir. 1968); *De Lima v. Trinidad Corporation,* 302 F.2d 585 (2nd Cir. 1962); *Hoyt v. Central Railroad,* 243 F.2d 840 (3rd Cir. 1957); *Parker v. Atchison, Topeka & Santa Fe Railway Company,* 58 Cal. Rptr. 362 (Cal. App. 1968).

The circuit courts have consistently approved the so-called Mathes and Devitt[1] instruction, given in this case at Clerk's Tr. p. 110, ll. 5 to 14. *Rogers v. Missouri Pacific Railway Co.,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957); *Tyree v. New York Central R. R. Co.,* 382

1. "An injury or damage is proximately caused by an act or failure to act, whenever it appears, from a preponderance of the evidence in the case, that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find, from the evidence in the case, that any negligence of the defendant contributed, in any way or manner, toward any injury or damage suffered by the plaintiff, you may find that such injury or damage was proximately caused by the defendant's act or omission." Mathes and Devitt, *Federal Jury Practice and Instructions,* Sec. 84.12 (1965).

F.2d 524 (6th Cir. 1967), cert. den. 389 U.S. 1014, 88 S.Ct. 589, 19 L.Ed.2d 659 (1967). This instruction combines a definition of causation with the concept that employer negligence need only be a partial or contributory cause to support an award. It should be noted here that the trial judge in this case went far beyond simply giving the Mathes and Devitt instruction and in conclusion advised the jury that "the primary inquiry for you to decide in this case is whether you draw the conclusion that negligence of the railroad employer played any part in bringing about the injury to plaintiff. If you find that any carelessness or negligence on the part of the railroad or any employee of the railroad other than the plaintiff in any way caused or contributed, even in the slightest degree, to the injury or injuries complained of, then your verdict should be for the plaintiff." (Clerk's Tr. p. 110, ll. 15-23)

Other instructions have been approved where the trial judge declined to give the Mathes and Devitt instruction but rather gave an acceptable definition of proximate cause blended with the concept that employer negligence, if any, need not be the sole cause so long as it is an actual, contributing, proximate cause. *Iannacito v. Denver & Rio Grande Western Railroad,* 380 F.2d 1019 (10th Cir. 1967); *Ganotis v. New York Central Railroad Company,* 342 F.2d 767 (6th Cir. 1965); *Olsen v. States Line,* 378 F.2d 217 (9th Cir. 1967); *Morrison v. New York Central Railroad Company,* 361 F.2d 319 (6th Cir. 1966).

Coray v. Southern Pacific Co., 335 U.S. 520 (1948) and *Rogers v. Missouri Pacific Railway Co.,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), relied on by peti-

tioner, do not lend support to the petition for certiorari. The circuit court here correctly points out at Appendix to Petition for Writ of Certiorari page 23, that *Coray* and *Rogers* hold that the negligence of the employer must contribute (*Coray*) at least in part to the injury and that the negligence must "play a part (*Rogers*) even though the very slightest in producing the injury." Both *Coray* and *Rogers* recognize the statutory requirement that employer negligence must play some part in producing the injury to sustain an award. The causation instructions requested and given by the Funseth trial court correctly indicate that the employer negligence necessary to support an award must be at least a partial cause of the injury and must have some role in producing the injury and without which such injury would not have happened.

CONCLUSION

Petitioner asserts that the trial and circuit courts erred in giving common law proximate cause instructions in an F.E.L.A. case. A careful reading of the instructions given, as shown by the analysis of those instructions by the Ninth Circuit Court of Appeals, establishes conclusively that the instructions given accurately reflected F.E.L.A. principles and were not limited to "common law proximate cause" as claimed.

The petition for certiorari should be denied.

Respectfully submitted,

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